No. 12084

United States
Circuit Court of Appeals
For the Ninth Circuit

S. P. BEECHER,
Appellant,
vs.
THE LEAVENWORTH STATE BANK and THE FEDERAL LAND BANK OF SPOKANE, et al,
Appellees.

Appeal from the Distict Court of the Eastern District of Washington, Northern Division

BRIEF OF APPELLEES

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Spokane 8, Washington.
Attorney for Appellee,
The Federal Land Bank of Spokane.

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Attorney for Appellee,,
The Leavenworth State Bank.

THE FRANKLIN PRESS, SPOKANE

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ORDERS ENTERED JUNE 27, 1947.
NOTICE OF APPEAL FILED JULY 25, 1947.
(Tr. I-200)

(1) Order of Judge on Petitions for Review of Commissioner's Order of Aug. 16, 1943. (Tr. I-199)

(2) Order denying Motion of Bankrupt to dismiss appeals. (Tr. I-198)

(3) Order denying Farm Debtor's Motion to disqualify and disbar C. D. Randall. (Tr. I-194)

(4) Order denying Farm Debtor's Motion to disqualify and disbar Herman Howe. (Tr. I-195)

(5) Motion to disqualify and dismiss Robert F. Murray as Conciliation Commissioner. (Tr. I-196)

Appellant has not in his briefs, assigned any error, or made any argument with respect to the above five appeals, and appellees move that said appeals be dismissed, and the Orders affirmed.

ORDERS ENTERED NOVEMBER 5, 1947.
NOTICE OF APPEAL FILED DECEMBER 3, 1947.
(Tr. II-451)

(1) Denying Farm Debtor's petition demanding a

jury trial in fixing the value of the real property of the Farm Debtor upon the petitions for reappraisal on file herein. (Tr. I-310)

(2) Denying Farm Debtor's petition demanding a jury trial on the recommendations of the Conciliation Commissioner in connection with Report of the Receiver. (Tr. I-310)

(3) Denying Farm Debtor's petition to dismiss creditors' petition for reappraisal. (Tr. I-310)

Appellant has not in his brief assigned any error or made any argument with respect to the above three appeals and appellees move that said appeals be dismissed and the Orders affirmed.

ORDERS ENTERED DECEMBER 30 and 31, 1947.
NOTICE OF APPEAL FILED JANUARY 27, 1948.
(Tr. V-1066)

(5) Order denying Farm Debtor's Motion to Revise Order entered 12/12/47 Appointing Attorney. (Tr. IV-932)

(6) Order denying petition of Farm Debtor for Rehearing of matters heard Dec. 10, 11, 12, 1947. (Tr. IV-933)

Appellant has not assigned any error or made any argument with respect to appeals numbered (5) and (6) above, and appellees move that said appeals be dismissed and the Orders affirmed. These are not appealable orders.

ORDERS ENTERED APRIL 9, 1948.

NOTICE OF APPEAL FILED MAY 7, 1948.
(Tr. V-1200)

(1) Order Terminating Stay. (Tr. V-1170)

Appellant assigns no error, and makes no argument in his briefs with respect to Order Terminating Stay and appellees move that said appeal from Order Terminating Stay be dismissed and the order affirmed.

ORDERS ENTERED AUG. 3, 1948 and ORDER OF JUNE 17, 1948.

NOTICE OF APPEAL FILED AUG. 9, 1948.
(Tr. VI-1404)

(1) Order denying Farm Debtor's petition for reconsideration of denial of petition to vacate orders of June 10 and June 11, 1948. (Tr. VI-1394)

   (a) The Order of June 10, 1948, was entitled "Order directing Conciliation Commissioner to refer petition to Judge of the United States District Court." (Tr. VI-1259)

   (b) The Order of June 11, 1948, was entitled "Order on Farm Debtor's petition to pay claim of Federal Land Bank and to pay taxes." (Tr. VI-1265)

(2) The Order of June 17, 1948, denied Farm Debtor's Motion "To set aside and revoke orders of June 10, 1948, and June 11, 1948." (Tr. VI-1270)

Farm Debtor did not appeal from the Orders of June 10 and 11, but only from the Order of June 17, 1948, denying his Motion to set aside and revoke said Orders, and from the Order of Aug. 3, 1948, denying his petition to reconsider his petition to set aside said orders.

Neither of these orders are appealable orders.

(4) "Order denying Motion of Farm Debtor to vacate all Orders and proceedings subsequent to May 1, 1946, and grant rehearings and denying correction of Motion by Farm Debtor to vacate all orders and proceedings subsequent to May 1, 1948, and grant rehearing and Motion amending and supplemental thereto."

This is not an appealable order.

(5) Order denying petition of Farm Debtor that checks be endorsed and money in Court be released to the Farm Debtor. (Tr. VI-1397)

(6) Order denying Farm Debtor's Motion to Compel Leavenworth State Bank to Obey Mandate. (Tr. VI-1395)

Appellant makes no assignment of error or argument in his briefs as to said Orders, and appellees move that the appeals from all of said Orders be dismissed and the Orders affirmed.

The only appeals covered by Appellant's Briefs with which we are concerned are from the following Orders:

(1) Order on Petition for Review of "Order Fixing Rental."

(2) Order on Petition for Review of "Order Approving Claims and Payment of Taxes to Chelan County."

(3) Order on Petition for Review of "Order Authorizing Payment of Attorney's and Stenographic Fees."

(4) Order Approving Receiver's Final Report.

(5) Order Approving Receiver's Supplemental Report.

STATEMENT OF CASE

Appellees believe that Appellant has made no adequate statement of the facts shown by the record and Appellees submit the following summary of the record pertinent to these appeals.

In 1939 appellant filed his petition under section 75a to r for composition with his creditors. No composition having been effected, on February 2, 1940, appellant amended his petition and the proceedings were referred to a conciliation commissioner for Chelan County. On petition of Leavenworth State Bank on August 17, 1943, a receiver was appointed, who entered into possession of the orchard property and remained in possession until about May 6, 1946, when the property was returned to the possession of appellant.

A three-year stay order was entered April 30, 1940. On appeal to this court it was held said stay order was void because it was entered before the orders

confirming the appraisal and setting aside the exemptions were entered. The mandate of this court was that a commissioner be appointed for Chelan County and that a three-year stay order be entered (Beecher vs. Federal Land Bank, 153 Fed. (2) 982).

An appeal was taken from the order appointing a receiver, which order was affirmed subject to the modification that the receivership terminate on the entry of the three-year stay order. (Beecher vs. Federal Land Bank, 153 Fed. (2) 987)

Robert F. Murray was appointed Commissioner for Chelan County, and on April 30, 1946, the district judge entered an order on the mandate of this court referring these proceedings to him and directing him to enter the three-year stay order, to put appellant in possession of his property, to fix the rental after notice to creditors, to deposit funds in certain banks subject to joint control of the Commissioner and appellant, and to hear the receivership accounting and recommend and advise the court with respect thereto (Tr. I-13 to 16).

Appellant appealed from the order on mandate (Tr. I-18), and said order was in all respects affirmed by this court (Beecher vs. Leavenworth State Bank, 160 Fed. (2) 294).

On May 6, 1946, Robert F. Murray, Commissioner, entered the three-year stay order directed by this court and ordered the receiver to put appellant in possession of all property held by the receiver excepting cash (Tr. I-177-178).

The appellant forthwith entered into possession of the orchard property (Vol. IV, Appellant's Brief, page 6a).

A meeting of creditors, at which appellant was present, was held September 11, 1946, for the purpose of fixing rental and approval of claims, at which evidence was heard. On June 25, 1947, the Commissioner entered a rental order (Tr. II-328), and an order approving claims (Tr. II-334). Petitions for review of said orders were filed by appellant (Tr. II-322 and 338). The Commissioner filed his certificates for review of the above orders on December 1, 1947 (Tr. II-320 to 334 and Tr. II-334 to 435). On November 29, 1947, the clerk of court mailed to appellant and each creditor a notice that appellant's petition for review of the aforesaid orders would be heard by District Judge on December 12, 1947 (Tr. II-318-319).

The said petitions were heard on said date, and on December 30, 1947, the court entered an order approving the order of Commissioner in regard to rentals (Tr. IV-917-918), and on the same date entered an order approving the Commissioner's order regarding claims with certain modifications (Tr. IV-918-921).

From said orders appellant, on January 23, 1948, gave notice of appeal (Tr. V-1067).

The report of receiver was filed with the Commissioner on August 9, 1946 (Tr. I-221 to 250). At the

hearing held in Wenatchee September 11, 1946, the receiver's report was considered, and evidence in support of and in opposition thereof was heard by the Commissioner, who, on June 26, 1947, filed with clerk of court his recommendations thereon (Tr. I-178 to 194). On August 5, 1947, appellant filed his exceptions to the recommendations of the Commissioner (Tr. I-206-215).

On December 11, 1947, the District Judge heard the report of the receiver, the Commissioner's recommendations and the exceptions of appellant thereto, and on December 30, 1947, entered an order approving the report, allowed compensation to the receiver, his attorney, to the attorney for appellant, to stenographers, and to the Commissioner acting as a master (Tr. IV-925-931).

On November 25, 1947, the clerk gave notice to appellant and to creditors that said hearing would be held on December 11, 1947 (Tr. II-313). From the order of the court, appellant, on January 23, 1948, gave notice of appeal (Tr. V-1067).

The Collector of Internal Revenue, on December 8, 1944, filed with clerk of court a claim for income tax alleged due from appellant for year March 1, 1941 to March 1, 1942 (Tr. I-128 et seq.). On December 11, 1947, said claim was considered by the court, and on April 9, 1948, the court entered an order approving said claim as a lien against moneys in possession of Leavenworth Fruit and Cold Storage Company (Tr. V-1168 to 1170).

From this order, notice of appeal was filed by appellant on May 6, 1948 (Tr. V-1200).

Miscellaneous matters deemed pertinent to these appeals.

Docket of Robert F. Murray, Commissioner (Tr. V-1224 to 1231).

Petition of appellant for redemption filed August 2, 1947 (Tr. I-201 to 204).

Request of The Federal Land Bank of Spokane for reappraisal filed August 7, 1947 (Tr. I-216-217)

Request of Leavenworth State Bank for reappraisal filed August 9, 1947 (Tr. I-218 to 220).

Withdrawal of petition of appellant to redeem filed December 3, 1947 (Tr. II-448).

Order entered December 10, 1947, granting appellant's petition to withdraw and denying reappraisal without prejudice to renew (Tr. II-491-492).

Petition by appellant filed January 27, 1948, requesting a reappraisal (Tr. V- 1058).

Request of creditors for reappraisal filed December 24, 1947 (Tr. IV-897).

Order of Judge granting request of appellant and creditors for reappraisal entered January 27, 1948 (Tr. V-1062 to 1063).

Petition by appellant to pay claim of The Federal Land Bank of Spokane and taxes against the orchard

property filed May 24, 1948, with referee, and filed June 11, 1948, with clerk (Tr. VI-1264).

Order of Judge directing payment of taxes and payment of $7500.00 on claim of The Federal Land Bank of Spokane entered June 11, 1948 (Tr. VI-1266 to 1267).

Order setting aside stay order entered April 9, 1948 (Tr. V-1170 to 1175).

ARGUMENT RE STAY ORDER

Volumes II and V of appellant's brief relate to the appeals from the order fixing rental entered by the Commissioner on June 25, 1947 (Tr. II-328), and the order approving claims entered on the same date (Tr. II-334), which orders were affirmed by the District Judge on review (Tr. IV-917-918) and (Tr. IV-918-921).

Briefly, after the reversal in *Beecher vs. Federal Land Bank of Spokane,* 153 Fed. (2) 982, the court appointed Robert F. Murray as Commissioner and, on April 30, 1946, referred this proceeding to him and directed him to enter a three-year stay order (Tr. I-13-16).

On May 6, 1946, Robert F. Murray entered the three-year stay order and directed the receiver to surrender possession of the orchard property to appellant (Tr. I-177-178).

Appellant, on page 6a of Volume IV of his brief,

admits that he was restored to possession on said date.

Specification of error No. 1 (Page 11 of Vol V) states said stay order is void or did not become effective until filed with Clerk of District Court. The argument is that under this court's decision in 160 Fed (2) 294, the order of the Commissioner was the order of the District Court, and that the order is void because there is no "filing mark" thereon.

In *Beecher vs. Leavenworth State Bank,* 160 Fed. (2) 294, this court stated two reasons why the order on the mandate should be affirmed; the first being that the court regarded the referee's order as the court's order which the Commissioner is to cause to be entered by the clerk; and the second being that the Commissioner has all the powers of a referee and that under section 66, Title 11 U. S. C., the Commissioner was the court and had power to enter the order.

We believe, when the mechanics of an appeal to this court are considered, the second is the true reason for affirmance of the order on mandate.

A three-year stay order is an appealable order. No orders of a referee can be considered by this court on appeal until it is reviewed by the District Judge. In *Patents Process, Inc. v. Durst,* 69 Fed. (2) 283 (C. C. A. 9th), this court stated:

> "No appeal to this court lies from an order of the referee except by way of petition for review

and an appeal from the order of the District Court on the petition."

After reference, the referee is the court for most purposes. His orders become final after 10 days from their entry unless a petition for review is filed (Sec. 67, Title 11 U. S. C.).

The Judge on hearing the petition shall

> "consider records, findings and orders certified to the judges by referees and confirm, modify or reverse such findings and orders, or return such records with instructions for further proceedings." (Sec. 11, Title 11 U. S. C.) Supp.

The District Judge could not by his direction to the Commissioner, either "confirm" or "reverse" an order thereafter to be made by the Commissioner.

Appellant urges also that the order is void because it does not bear "filing marks." Section 70, Title 11 U. S. C., provides:

> "The records of all proceedings in each case before a referee shall be kept as nearly as may be in the same manner as records are kept in equity cases in the district courts of the United States."

General Order No. 37 following section 53, Title 11 U. S. C., provides:

> "In proceedings under the act the Rules for Civil Procedure for the district courts of the United States shall insofar as they are not inconsistent with the act or with these General Orders, be followed as nearly as may be."

Rule 58, Rules of Civil Procedure, provides in part:

> "The notation of a judgment in the civil docket as provided by Rule 79(a) constitutes the entry of the judgment; and the judgment is not effective before such entry."

From the above it is evident that the docket of the referee determines when an order of the referee is entered.

The docket of Robert F. Murray, Commissioner, is found Tr. V-1224 to 1231. On page 1224 it is shown that Conciliation Commissioner's order on mandate dated May 6, 1946, was entered May 6, 1946. This is the order which granted the three-year stay (Tr. I-176).

Rule 13 of the District Court providing:

> "An order of a referee shall be deemed entered when signed and filed with an appropriate filing mark in the referee's office"

was not intended and could not supplant the requirements of Congress or of the General Orders that the referee's docket shall show the date of Entry of Orders.

In 21 Corpus Juris Secundum 266 it is stated:

> "Only such matters as are not regulated by general or special laws in reference to practice and procedure . . . may be regulated by a rule of court."

As stated in *Zimmerman vs. Zimmerman,* 155 Pac. (2) 293 (Ore.), at 300, "the word 'deemed' . . . should not be construed as creating a conclusive, but only a disputable presumption."

We submit the order of the judge on mandate was an order to the Commissioner after reference to act as the court in entering the three-year stay order, that this order entered was an order of the Commissioner subject to review by the District Judge and that the docket of Commissioner shows it was entered May 6, 1946.

ARGUMENT RELATING TO APPEAL FROM THE RENTAL ORDER

After the entry of the three-year stay order, a meeting of creditors and of the bankrupt was called for September 11, 1946, for the purpose of fixing rental, approval of claims and consideration of the receiver's report. A number of days were spent in hearing objections and evidence, and the Commmissioner took the matters under advisement. A formal order on rental was entered by the Commissioner on June 25, 1947 (Tr. II-328 et seq.). The Commissioner's certificate on review is found in Tr. II-320 to 328.

Appellant erroneously assumes that the obligation to pay rental dates from the date of entry of the rental order, whereas the act and the decisions obliges the debtor to pay rental from the entry of the stay order.

The pertinent provision of the Act is section 203 (2) Title 11 U. S. C. (sec. 75s of Bankruptcy Act), which provides:

> "When the conditions set forth in this section have been complied with, the court shall stay all judicial or official proceedings . . . against the debtor or any of his property for a period of three years. During said three years the debtor shall be permitted to retain possession of all or any part of his property, in the custody and under the supervision and control of the court, provided he pays a reasonable rental semi-annually for that part of the property of which he retains possession."

Paradise Land & Livestock Co. vs. Federal Land Bank, 118 Fed. (2) 215 (C. C. A. 10th) cited by appellant holds:

> "The stay order performs three functions. It stays proceedings, *it fixes the beginning of the three-year period during which the debtor must pay a reasonable rental* semi-annually for that part of the property of which he retains possession, and it fixes the date within one year from which the first payment of rental must be made."

All the decisions cited by appellant on page 14 (sub. 11) hold is that a rental order cannot require payment of rental for period prior to the *stay order.*

Appellant also objects to requirements of the rental order.

The summary of the evidence is found in Tr. II-325 to 328. From this it appears that appellant himself testified that no land in the vicinity was rented for cash and that the usual rental for the orchard property was a percentage of net proceeds of crops grown. Appellant further testified that 40% of net

proceeds was the usual rental, and the Commissioner adopted the views of appellant. There also is testimony that net proceeds meant gross receipts less cost of growing, harvesting and marketing, which was accepted by the Commissioner. The order shows that the time of payment is set forth in the order.

In view of the nature of the property and the fact that a cash rental was not possible, we submit the order of the Commissioner was not only a proper order, but the only one which could have been entered under the circumstances.

The claim that appellant has tendered into court the appraised value for redemption and that the matter of rental is moot (page 15, Vol. V Appellant's Brief) is not substantiated by the record. Appellant did tender into court the appraised value (Tr. I-201); on the filing of a request for reappraisal (Tr. I- 216-218) appellant withdrew his petition for redemption (Tr. II-448), and the court by order permitted the withdrawal of said petition (Tr. II-491).

If he had tendered money into court for a redemption, unless the amount was sufficient to pay all claims and interest, he would not be relieved of his duty to pay the rental. (Wilson vs. Dewey, 133 Fed. (2) 962, C. C. A. 8th).

ARGUMENT RELATING TO APPEAL FROM ORDER APPROVING CLAIMS

This argument is directed to Volumes II and IV

of appellant's brief. The points relied upon by appellant are stated in Volume II of said brief. Without unduly extending our brief we cannot discuss each of the points separately.

The certificate of Commissioner (Tr. II-334 et seq.) shows that Points I, III and IV have no merit. The certificate contains all the requirements of the statute. It contains a statement of the question presented, and the order is supported by fiindings. Two points have been argued:

(1) That the matters contained in appellant's designation of record were not included; and

(2) That appellant had no sufficient notice of the hearing set for December 10-11-12, 1947.

The duties of a referee when a petition for review is filed are stated in section 67(8), Title 11 U. S. C. These duties are:

> "Prepare promptly and transmit to the clerks certificates on petitions for review of orders made by them, together with a statement of question presented, the findings and order thereon, the petition for review, a transcript of the evidence or a summary thereof, and all exhibits."

The record transmitted fully complied with these requirements (Tr. II-334, et seq.).

There is no requirement that one seeking a review shall file a designation of the record, but the Commissioner did transmit substantially all requested by appellant and all to which he was entitled.

The designation of record called for all records, files and orders. It also called for all correspondence in any way referring to the above entitled matters. Manifestly, correspondence not admitted in evidence should not have been transmitted, nor should records, files and orders not relating to the specific order being reviewed be sent to the District Court.

Although calling for the evidence, appellant did not furnish a transcript thereof as required by Rule 13 of the District Court rules, the Commissioner had no money to pay for a transcript and, therefore, he furnished a summary of evidence as provided by the above statute (Tr. II-348 et seq.).

On the objection that appellant did not have sufficient notice of the hearing on December 12, 1948, the record shows (Tr. II-318) that on November 29, 1947, the clerk gave notice by mail to appellant and his creditors, that the hearing on petition for review of the order approving claims and fixing rental would be heard on December 12, 1947. Appellant had 13 days' notice of date of hearing.

The record further shows that the Commissioner on December 6, 1947, mailed to appellant a notice of the filing of the record as required by Rule 13 of District Court rules. Insofar as sub (d) and (e) of Rule 13 is concerned, these were promulgated for the convenience of the court which the court has power to waive (U. S. vs. Breitling, 20 Howard 252, 15 Law Ed. 900).

Rule 13 of the District Court is as follows:

"(a) An order of a referee shall be deemed entered when signed and filed with an appropriate filing mark in the referee's office. The Referee shall promptly mail written notice of the entry of any order to any party who has filed a written request therefor.

"(b) The party who files a petition for a review of an order made by a referee shall, at the time of filing such petition, or within such further time as the court may, for cause shown, allow, furnish the referee a transcript or summary of the evidence adduced upon the hearing of the matter sought to be reviewed.

"The Referee shall promptly mail notice of the furnishing of such transcript or summary to all parties or their counsel, who were present at the hearing of the matter sought to be reviewed, and they may, within ten days from the mailing of such notice, present to the Referee objections or amendments to such transcript or summary. The Referee may make such corrections of the transcript as the facts may require and he may adopt the summary or the objections and amendments thereto of any party, or he may prepare his own summary of the evidence.

"(c) Upon filing his certificate on review with the Clerk, the Referee shall forthwith mail notice of the date of such filing to each party or his counsel who was represented at the hearing of the matter sought to be reviewed.

"(d) Within ten days after the mailing of notice of the filing of the Referee's certificate the reviewing party shall serve upon the respondent and referee and file with the Clerk a memorandum of his points and authorities and the respondent shall likewise serve and file his reply memorandum within five days thereafter.

"(e) After the expiration of five days from the mailing of notice of the filing of the certificate on review, any party to the review may note the same for hearing as motions are noted under the Local Rules.

"(f) Before preparing his certificate on review or any summary of the evidence in connection therewith, the Referee may require a deposit of indemnity to cover all charges incident to review, in the amounts authorized by these rules. If such deposit is not made within five days after demand therefor, the Referee may certify the case to the Judge for dismissal of the review." (Tr. IV-887)

Appellant urges that the supplemental claim of The Federal Land Bank of Spokane filed September 11, 1946, and supplemental claim of Leavenworth State Bank filed September 11, 1946, should not be allowed because not filed within 6 months from date of first meeting of creditors. The supplemental claim of The Federal Land Bank of Spokane is found in Tr. II-371 to 373, and shows that The Federal Land Bank of Spokane had a certificate of sale in a foreclosure issued prior to institution of these proceedings on Lots 4, 9, 11 and 12 of Springdale Orchards, and that in May, 1940, a secured claim was filed for the amount of the certificate. It further shows that after filing the claim The Federal Land Bank of Spokane paid taxes to Chelan County which were a lien on the said property, and claim for the amount thereof was filed as a secured claim in the sum of $672.54 and interest. Said payments was made under section 11264 of Remington's Revised Statutes, which provides:

> "Any person who has a lien by mortgage or otherwise upon any real property upon which the taxes have not been paid may pay such taxes and the interest, penalty and costs thereon, and the receipt of the county treasurer shall constitute an additional lien upon such land to the amount therein stated."

The receipt of the County Treasurer is attached to and made a part of said supplemental claim. Said payment was further authorized by section 595 of Remington's Revised Statutes of Washington, which provides:

> "The judgment debtor or his successor in interest, or any redemptioner, may redeem the property at any time within one year after the sale, on paying the amount of the bid, with interest thereon at the rate of eight per cent per annum to the time of redemption, together with the amount of any assessment or taxes which the purchaser of his successor in interest may have paid thereon after purchase, and like interest on such amount."

The supplemental claim of Leavenworth State Bank is found in Tr. II-367 and shows that said claimant who was the holder of a judgment under foreclosure of a mortgage on Lots 4, 9, 11, 12 and 13 of Springdale Orchards paid irrigation assessments and taxes which were a lien on said property in sum of $519.12, irrigation assessments, and $931.34, taxes, with interest. Said payments were made under the aforesaid section 11264 of Remington's Revised Statutes.

Appellant is in error in his statement that these

secured claims are barred because not filed within 6 months from the date of the first meeting of creditors. In *Courtney vs. Fidelity Trust Co.,* 219 Fed. 57 at 63, the Circuit Court of Appeals for the Sixth Circuits stated:

> "The formal proof of claims required by the bankruptcy act has reference for the most part, if not entirely, to unsecured claims . . . where admittedly a claim is fully secured by a lien upon property of the bankrupt, such proof is not necessary to the enforcement of a lien."

This rule was approved as applicable in proceedings under section 75 of the Bankruptcy Act in *Raffert vs. Federal Farm Mortgage Corporation,* 152 Fed. (2) 193 (C. C. A. 8th).

On page 3 of Volume V of his brief, appellant concedes that the claim of The Federal Land Bank of Spokane and its supplemental claim should be approved except as to interest. His contention is that interest stops on both secured and unsecured claims as of date of the adjudication. The rule is that, as to unsecured claims, if the estate is insolvent, interest is not collectible. As to secured claims, the rule is otherwise.

This court in *U. S. vs. Sampsell,* 153 Fed. (2) 731 at 736, stated:

> "The general rule holds that interest stops running upon secured and unsecured claims after a debtor passes into bankruptcy unless the estate is solvent. There is an exception, however, holding that the rule does not apply to debts or

> claims of secured debts after and during bankruptcy when the mortgaged property is sufficient to pay the principal and interest of the mortgaged debt."

The case of *Wilson vs. Dewey,* 133 Fed. (2) 962 (C. C. A. 8th), holds that this rule is applicable in proceedings under section 75 of the Bankruptcy Act.

The answering appellees did not represent Chelan County in filing its claim and in securing its allowance. We therefore refrain from arguing as to the propriety of its allowance other than to suggest to the court that this court in *Carbon Co. vs. Lee,* 36 Fed. (2) 218 (C. C. A. 9th), stated:

> "It is the duty of the trustee to search for taxes and pay those which are legal. Consequently claims for taxes need not be verified, and no formal proof of claim is required."

CLAIM OF LEAVENWORTH STATE BANK

At the hearing before the Conciliation Commissioner on September 11, 1946, the Commissioner found from the Claim filed and the evidence admitted, that the Claim should be approved as filed (Tr. II-421).

From the evidence admitted, the Commissioner also allowed the Supplemental Claim for Taxes paid (Tr. II-422).

The Claim of the Leavenworth State Bank was based on a Judgment of the Superior Court of Chelan County, Washington, entered January 6, 1940. A certified copy of the Judgment, and a certified

copy of the remittitur from the Supreme Court of the State of Washington affirming said Judgment, was admitted in evidence, and the Commissioner considered the decision of the United States Circuit Court of Appeals for the Ninth Circuit in Cause No. 11,244, upholding the right of said Superior Court to enter said Judgment. *Beecher v. The Federal Land Bank,* 156 Fed. (2) 220.

The Appellant now attacks the Claim, first, on the ground that the Judgment was void; and second, because he alleges that the notes upon which the Judgment was based, were at one time assigned to Eastern bankers without recourse, and later on acquired for less than their face value.

The first question is settled by the decision in *Beecher v. The Federal Land Bank,* 156 Fed. (2) 220, in which the Order of the District Court of November 19, 1939, permitting the foreclosure proceedings in the State Court to advance to the point of a decree of foreclosure was affirmed.

Appellant filed his Petition under Section 75, July 31, 1939, which was approved and referred to the Conciliation Commissioner for Chelan County on the same date (Tr. 10,391 pp. 1-14).

In this proceeding the Leavenworth State Bank presented and filed its Creditor's Claim (Tr. 10,391, pp. 457-460) in the amount of $21,111.36, interest and costs, in which it stated as follows:

> "That notwithstanding that suit upon claimant's notes and mortgage is now pending in the Superior Court of Chelan County, Washington, and has been so pending since April 24, 1939, and the amount of his indebtedness to claimant is well known to said S. P. Beecher, the said S. P. Beecher in his 'statement of debts and names and addresses of creditors,' has listed the amount owing to claimant as $5500 instead of the actual amount of said indebtedness. That in case the amount of said indebtedness be disputed by said Debtor, the claimant should be authorized to proceed with its suit upon said notes and mortgage in said Superior Court, and the amount of said claim established and determined."

On November 13, 1939, the Leavenworth State Bank filed its Petition for authority to maintain its suit in the State Court, setting forth in said Petition that:

> "The said S. P. Beecher objected to the allowance of Petitioner's Claim in any amount exceeding $5500.00." (Tr. 10,391 pp. 30-32)

November 18, 1939, the Order of the District Court on said Petition was entered (Tr. 11,244, p. 1) authorizing the Bank to maintain its suit,

> "to the extent of having all of the issues therein determined and decree entered by said Superior Court."

Thereafter the suit proceeded to judgment in the Superior Court, where judgment was entered on January 6, 1940. On February 1, 1940, Appellant filed his amended Petition under Section 75(s), scheduling the claim of the Leavenworth State Bank at

the amount determined by the judgment of the State Court, appending to the Schedule, a notation as follows:

> "From this Decree, petitioner asks the right to perfect an appeal, believing that the mortgage indebtedness can be cut to a figure between $5,000.00 and $6,000.00"

On April 30, 1943, an Order entered by the Conciliation Commissioner provided:

> "That the said Bankrupt may prosecute his appeal to the Supreme Court of the State of Washington from that certain Judgment and Decree entered against him in the Superior Court of Chelan County on January 6, 1940, in the case of the Leavenworth State Bank, a corporation, plaintiff, v S. P. Beecher and Katherine C. Parker, defendants."

The Appellant thereafter prosecuted his appeal to the Supreme Court of the State of Washington, and the Judgment and Decree of the Superior Court was affirmed. *Leavenworth State Bank v. Beecher,* 6 Wash. (2) 483, 108 P. (2) 345.

The next question was whether the Leavenworth State Bank's Claim was allowable for the amount of the judgment. The Appellant states at page 25 of Volume II of Appellant's Brief:

> "Farm-Debtor believes that in this appeal, the principle to be determined is whether a creditor, R. B. Field, President of the Leavenworth State Bank, can personally repurchase notes sold to Eastern banks without recourse and later, upon the liquidation of said banks, having re-acquired them for a few cents on the dollar, prove his

claim for the full face value, including interest."

There is not the slightest evidence in this Record to prove that R. B. Field, President of the Leavenworth State Bank, repurchased the notes sold to Eastern banks without recourse and later, upon the liquidation of said banks, acquired them for a few cents on the dollar.

In Farm Debtor's so-called "Petition to reopen or reconsideration of the hearing on September 11, 1946, and objections thereto," there is no suggestion that the Appellant desired to present evidence of any equitable defense to said claim of the Leavenworth State Bank (Tr. IV-882, 883).

The only authority cited by Appellant in support of his proposition, is the case of *U. S. Fidelity & Guaranty Company v. Bray,* 225 U. S. 205, 56 L. ed. 1055, and Appellant has mistated the holding in the Bray case.

In that case the only holding made by the Court is that exclusive jurisdiction in Bankruptcy proceedings is in the Federal District Court. In that case the Bankruptcy Court did not authorize any claims to be litigated in the State Court; the State Court instead of having ruled on the claims, was enjoined from proceeding with the cause, and the Supreme Court said nothing whatever about the amount for which the claims could be proved or allowed.

The Court held that the exclusiveness of the jurisdiction of the Bankruptcy Court of proceedings in

bankruptcy, precludes the maintenance in a Federal Circuit Court, even with the express leave of the Bankruptcy Court, of a plenary suit in equity brought by the Surety for the Bankrupt Public Contractor involving collateral and extraneous matters with which the creditors of the Bankrupt have no concern, but having for its primary purpose the control over the distributing of a fund in the Trustee's posession admittedly belonging to the Bankrupt's estate.

Even if there were evidence in this Record to support Appellant's contention that the Leavenworth State Bank reacquired the notes secured by its mortgage at less than their face value, that fact would not give rise to any equitable defense on the part of the Appellant. If he has equitable defenses they must exist against the original notes in the hands of the original payees. In *Fidelity-Philadelphia Trust Company et al, Trustees, v. Philadelphia-Girard National Bank,* 33 Fed. (2) 649, the defendant Bank more than four months before bankruptcy, negotiated the Bankrupt's notes and on bankruptcy reacquired the notes from the transferee.

The Court held (certiorari denied) 280 U. S. 606, 74 L. ed. 650, that the payee could reacquire the notes and obtain all its original rights with power to sell collateral, apply proceeds in satisfaction of the notes free from the general creditors, even though the notes were reacquired after insolvency.

The Court said, at page 650:

> "The City Bank was at the time in question, holder or transferee of all the notes with the original powers and rights restored to it on reacquiring them." * * * "McGowan's notes were negotiable. He thus had set them adrift on the commercial sea and he was bound by their terms into whatever port they might go. They charted no course and contained no limitation of movement or use and * * * the City Bank could hold them, sell them, and having sold them, could reacquire them, and on default sell their collateral and apply the proceeds on the five notes and any excess to the payment of other notes whose collateral was insufficient."

In other words, if there are no equitable defenses, the consideration paid by the transferee is not material so far as the maker is concerned. *Warden v. Kennedy,* (Ky.) 56 SW (2) 329 at 331

The reacquisition of the notes for less than their face value, even if that be true, does not give rise to an equitable defense, and even if it did, the Appellant has never availed himself of that defense even though he has had every opportunity to do so.

It clearly appears from the record that the matter of the validity and amount of the Leavenworth State Bank's claim was determined by the State Court, pursuant to the order of the District Court authorizing and directing that it be determined in that manner. Beecher was represented by able counsel, and the claim was contested in both the Superior Court and in the Supreme Court of the State

of Washington. He now asks that he be permitted to have the claim reexamined and the matters determined in that litigation tried over again; but the judgment determining the amount of the claim is *res adjudicata,* not only as to the matters which were presented by him as alleged defenses to the claim, but also as to all matters which could have been presented by him in defense of the suit. The judgment was binding on Appellant in the Bankruptcy Court. *Heiser v. Woodruff,* 327 U. S. 726, 733, 735, 90 L. ed. 970.

At the hearing before the District Court upon petition for review of the order of the conciliation commissioner allowing the claim of the Leavenworth State Bank, the claim was reduced by eliminating therefrom the $500.00 attorney's fee and $31.70 costs incurred in the proceedings before the State Court. The amount of the claim, as allowed, therefore, is only the actual indebtedness which the State Court found was due and owing at the time the bankruptcy proceedings were instituted.

The method pursued in connection with the liquidation of this claim, or the determination of the amount due thereon, has been approved in numerous cases.

Brown v. O'Keefe, 300 U. S. 598;

McHenry v. La Societie Francaise, 95 U. S. 58;

In re Johnson, 127 Fed. 618;

In re Schulte-United, Inc., 50 Fed. (2d) 243;

In re Gas Products Co., 57 Fed. (2d) 342.

As to the contention of Beecher that the bankruptcy court should now reopen the case and determine the amount actually paid by the Bank for the notes secured by its mortgage (assuming the said notes were actually purchased by the Bank, and assuming they were purchased for less than their face value), such procedure would have no effect upon the validity of the claim to the full extent of the indebtedness owing. The only cases holding that the amount actually paid for notes or securities of the bankrupt is the amount for which the claim of the purchaser should be allowed, are cases involving a trust relationship, in which the allowance of claims for the full amount owing would result in a fraud upon creditors.

In *Monroe v. Scofield,* 135 Fed. (2d) 725, a director of the bankrupt corporation purchased a claim against the corporation at a discount, and the court held that on account of his trust relationship to the corporation at that time, the corporation must be given the benefit of the discount, and his claim only allowed for the amount actually paid.

In *Baer v. Security Trust Co.*, 32 Fed. (2d) 147, the court held that the purchase of notes of the bankrupt corporation at a discount should have been approved, and the purchaser recognized as a purchaser in good faith of the notes; but held that a "paper sale" to himself of the collateral security pledged to secure the notes was fraudulent as to creditors. This decision was clearly right, as the collateral

security was held only to secure payment of the notes, and actually belonged to the bankrupt; consequently the transfer of this collateral to his own name was a fraud upon the corporation and its creditors.

In *In re Jersey Materials Co.*, 50 Fed. Supp. 428, the court held that the purchase of a mortgage at a discount was made "with the intent that Schweyer (the other stockholder of the corporation) should benefit thereby", and that consequently the claimant should only recover the amount he actually paid.

In all of these cases the obtaining of claims at a discount was a fraud upon the bankrupt, in violation of the duties of a trust relationship between the purchaser of the claim and the bankrupt corporation and its creditors. There was no fiduciary relationship between the bank and appellant.

In this case there is no legal reason why the Leavenworth State Bank, or any person, could not purchase the mortgage or the notes secured thereby, at any price the owner would be willing to accept; and even if Beecher could show that they were purchased at a discount, it would avail him nothing. His obligation to pay is still the amount he borrowed and obligated himself to repay, and the amount determined to be owing by him by the judgment of the Superior Court and the Supreme Court of Washington.

CLAIM OF CITIZENS STATE BANK OF OMAK

In his original petition for conciliation under the the provisions of (a) to (r) of the Frazier-Lemke law, Mr. Beecher scheduled the indebtedness owing to the Citizens State Bank of Omak, in the amount of "approximately $1300.00." In his subsequent petition under subdivision (s) the debt was scheduled by him in the amount of $1296.72. He has never disputed the validity or amount of the indebtedness. His only objection to the claim has been as to the lien of the judgment and attachments, and the claim having been allowed only as an unsecured claim, this objection has become moot.

He now contends that the claim was not filed within the time allowed by law, for the reason that it was filed as a claim on the judgment of the Citizens State Bank instead of on the original note. At the time of the hearing and allowance of the claim by the conciliation commissioner, the original judgment, and the original promissory note on which the judgment was based, were introduced in evidence, and the Court permitted the claim to be amended as a claim on the note, plus the costs incurred prior to the institution of these proceedings, for the reason that the judgment on the note was not entered until three days after the original petition for conciliation had been filed. This was clearly within the discretion of the Court, and the allowing of amendment to the claim was permissible.

In 8 C. J. S., pp. 1297-8 (Bankruptcy, Sec. 433) it is said:

> "The bankruptcy court or referee is generally regarded as having discretionary power to permit the amendment of proofs of claims in bankruptcy to cure or correct defects, insufficiencies, or mistakes therein. Moreover, the power is one which will be exercised with great liberality in favor of allowing amendments, particularly where, without fraud, there has been mistake or ignorance of law or fact so that justice seems to require that the amendment should be permitted and all parties can be placed in the same situation they would have occupied if the error had not occurred. . . .
>
> "In accordance with the foregoing, amendments have been allowed to correct formal defects or omissions in the proof generally; add to or make more specific insufficient allegations or statements of the claim or consideration; show payments which would make provable a claim apparently barred by limitations; conform the proof to the true facts as shown by the evidence; change the claim from one based on a deficiency judgment not binding on the trustee to one for the balance of the debt over the reasonable value of the property sold on foreclosure; change the theory on which the claim is based; include a set-off; increase the amount of the claim by preferences the claimant has been compelled to surrender; correct an omission to file a written instrument on which the claim was based; and correct a defective verification."

It is well settled that the fact that the period for making original proof of claim has expired does not preclude the allowance of an amendment to the claim.

In re Fiegil, 22 Fed. Supp. 364;
Cook v. Union Trust Co., 71 Fed. (2d) 645;
In re Lipman, 65 Fed. (2d) 366;
In re Hotel St. James Co., 65 Fed. (2d) 82;
Garvin v. Hickam, 91 Fed. (2d) 323;
In re Magnet Oil Co., 119 Fed. (2d) 260;
In re Ebeling, 123 Fed. (2d) 520.

The claim of the Citizens State Bank of Omak was duly filed in the conciliation proceedings; and thereafter was promptly filed in the proceedings under section 75(s). Its validity was proved and never disputed, and the fact that it was allowed as a claim on the original note, plus costs accrued, instead of on the judgment obtained, is not material. All attorney's fees and costs of suit were eliminated.

APPELLANT'S EXCEPTIONS TO THE APPROVAL OF THE RECEIVER'S FINAL REPORT

1. The Assignments of Error are set forth at Vol. I-22 of Appellant's Brief.

In Assignments numbered I and II, the Appellant for the third time challenges the appointment of a Receiver made by the Order of August 17, 1943, and claims that the appointment was void, and all acts by the Receiver were invalid, and therefore he demands that the Receiver's Account be surcharged with all amounts disbursed for income taxes paid

the United States Government as the result of his operations and for the fees allowed to the Receiver and to his Attorney, and for the fees allowed the Attorney appointed on the Petition of the Appellant to represent the Appellant and the estate in the receivership accounting, and also for the fees paid to the Court Reporters.

In Assignments number three and four, he asks that the Order Approving the Receiver's Final Account and Report, be set aside, because:

(a) It was made in part on recommendations of the Conciliation Commissioner, and he claims that there is no authority in law for a Referee to make recommendations to the District Court, and,

(b) That the recommendation of the Conciliation Commissioner was not accompanied by proper Findings of Fact and Conclusions of Law, or the evidence, or the designated record.

Has the Appellant the right to again (for the third time) challenge the jurisdiction of the Court to appoint a Receiver?

Because Appellant had so neglected his orchard property that his neighbors had taken preliminary steps to have the place condemned as a threat to adjoining orchards, and because it was in imminent peril of condemnation as a public nuisance, the Court appointed the Temporary Receiver, and after a Show Cause Order had been issued and served upon the Appellant, the matter of making the Receiver per-

manent came on for hearing on August 17, 1943, and an Order was entered appointing the Permanent Receiver.

The Court will recall in cause No. 10,391, decided December 30, 1944, the Appellant first brought before this Court his appeal having to do with reference to appointment of a Temporary, and later, a Permanent, Receiver, and with the approval of the Receiver's Account, and that the Orders were affirmed. *Beecher v. Federal Land Bank of Spokane,* 146 F. (2) 934 (2nd case).

On rehearing this matter came before the Court in cause No. 10,789, and the decision of this Court was filed February 25, 1946. This Court affirmed the previous Orders except that it revised the Order appealed from by providing that the words, "Permanent Receiver" were ordered stricken, and the words, "Receiver until a Three Year Stay Order is made" was substituted therefor, and the Court held, "As so amended the Order of August 17, 1943, appointing the Receiver is confirmed." *Beecher v. Federal Land Bank,* 153 Fed. (2) 987.

The Court will recall that the Appellant filed a Petition for Writ of Certiorari to the Supreme Court of the United States in both causes No. 10,391 and No. 10,789. In his Petition he appealed from the "Order Appointing a Temporary Receiver," filed July 3, 1943, from the "Order Appointing a Permanent Receiver," filed August 17, 1943, and from

the "Order Confirming the First Report of the Receiver" filed April 15, 1944.

Writ of Certiorari was denied on June 10, 1946. 328 U. S. 869, 871, 90 L. ed. 1639, 1641.

One would think this would put the matter at rest, but apparently not with Appellant, for again he came before this Court.

Every contention made by the Appellant on this Appeal so far as the appointment of the Receiver was concerned, was again before this Court in cause No. 11,503, and was decided against the Appellant on March 10, 1947. *Beecher v. Leavenworth State Bank,* 160 F. (2) 296.

We see no point in belaboring the point further. The fact remains, however, that if a Receiver had not been appointed, and had he not taken immediate and appropriate means to control the infestation which existed in the Appellant's orchard, the place would surely have been condemned under authority of State law.

There is nothing in the Record except the gratuitous and uncorroborated statement of the Appellant in his Brief with respect to any conspiracy or improper acts on the part of Mr. Field, the President of the Leavenworth State Bank.

When the return date of the Order to Show Cause Why the Temporary Receiver Should not be Made

Permant, came on for hearing, the Appellant did not appear.

This disposes of Appellant's Assignments of Error No. I and II.

2. Did the Conciliation Commissioner have authority to hear the Final Report of the Receiver and make recommendations to the Court? (Assignments of Error Nos. III and IV.)

This point is likewise set at rest by the Decision of this Court in cause No. 10,391, *Beecher v. Federal Land Bank,* 153 F. (2) 982-3. This Court expressly directed the appointment of a Conciliation Commissioner and Referee, for his (the Farm Debtor's) and the Court's advice in all matters arising under Sec. 75(s), "including inter alia the Receivership Accounting."

In pursuance of this Decision, the District Court made an Order on the Mandate (from which of course the Appellant appealed and the Order was affirmed). *Beecher v. Leavenworth State Bank,* 160 F. (2) 294. The Conciliation Commissioner was appointed and the Receivership Accounting was referred to him.

The Receiver's Account was filed onAugust 14, 1946, and a copy served upon Appellant (Tr. Vol. I, 179).

Mr. Robert F. Murray, the Commissioner, held a hearing after proper notice to all creditors, which

not only consumed three days, but often ran into the late hours of the night, at which the Receiver's Account was submitted and proved to be correct, down to the last penny of receipts and disbursements (Tr. I-221).

The Conciliation Commissioner made recommendation to the Judge which contained detailed Findings of Fact and Conclusions of Law on the Receiver's Report and Account (Tr. I-178).

The Appellant and his attorney, Mr. Horswill, make no claim that the Receiver's Account has not been proved correct in every particular. Appellant makes no showing that any questions regarding the accuracy of the Account would be raised if the transcript of the evidence taken before the Conciliation Commissioner were before the Court (Tr. I-206).

The Receiver, being satisfied with the recommendations of the Conciliation Commissioner, did not feel justified in asking for the expenditure of $400.00 or $500.00 of the estate funds to have the evidence transcribed. Besides the exhibits produced by the Receiver were sufficient unto themselves to prove the Account.

The Appellant, when he filed his Petition for Review with the Conciliation Commissioner, designated as part of the Record to be sent up, a transcript of the evidence. Of course the Conciliation Commissioner did not have a transcript of the evidence and had no funds with which to have it transcribed.

If the Appellant wanted a transcript of the evidence, it was up to him at that time to order it from the Court Reporter and cause it to be filed with the Conciliation Commissioner, (Rule 13, Tr. IV-887) and if he felt that the estate should pay the $400.00 or $500.00 necessary to have the evidence transcribed, he should have filed a Petition with the Conciliation Commissioner or the Judge asking that such funds be made available for that purpose from the estate. This he did not do, but even so, he complains without any purpose behind his complaint, that the transcript of the evidence taken at the hearing on the Receiver's Report was not before the Court, because he raises no questions of fact, but only questions of law.

However, it will be observed from Appellant's Brief, that he questions certain disbursements made by the Receiver, not because the disbursements were not made or that the amounts of such disbursements were inaccurately reported, and with respect to all of these, he raises no question of fact, but only questions of law. He claims that the disbursements were improper.

3. First, Appellant objects because the Receiver paid the Income Tax in connection with his operations for the years 1943, 1944 and 1945. Was the Receiver justified in paying these taxes? The Receiver was a Receiver in possession of all of the income-producing property or business of the Appellant. Notwithstanding this, the Receiver did not act without authority of the Court. In cause No. 11,503,

there was before this Court on appeal, Orders entered by Judge Schewellenbach on May 23, 1945, approving the First and Final Report of the Temporary Receiver, and a Petition for his discharge, and the First Report of the Receiver, which covered the period of his operations between August 15, 1943, through February 29, 1944, and from March 1, 1944, through February 28, 1945, in connection with which the Receiver also asked for approval of his estimate cost of operation from March 1, 1945, through February 28, 1946.

The Receiver in this connection reported that he was informed and believed that his liability to the United States for Income Tax from earnings of the orchard property for the fiscal year ending February 28, 1945, would be between $3250.00 to $3500.00, and that he desired the direction of the Court as to whether or not such liability should be paid by the Receiver as operating expense. (Cause No. 11,503. Tr. pages 8, 10, 31. Tr. certified June 28, 1945, by A. A. La Framboise, Clerk.)

On that appeal, the Appellant contended that the Receiver was without authority to pay the Income Taxes resulting from his operation. (See Specifications of Error under point XI, page 27 of Appellant's Brief, Cause No. 11,503, Item (i), page 30, Item 14, page 36.)

The Record in that case shows that after the Report of the Temporary Receiver and the Report

of the Permanent Receiver, and the Receiver's estimated cost of operation from March 1, 1945, through February 28, 1946, including the estimated item for Income Taxes had been filed, the District Judge entered an Order to Show Cause why those reports should not be approved returnable on April 26, 1945 (Supplemental Transcript in Cause No. 10,391, page 1, Item (i).)

The Order of May 23, 1945, specifically authorized the Receiver to pay any and all Income Taxes for the fiscal year ending February 29, 1944, and also for the fiscal year ending February 28, 1945, estimated at between $3250.00 and $3500.00, "but the Receiver shall not be limited by said estimates." (Tr. Cause No. 11,503, page 48.)

Appellant appealed from the Order of May 23, 1945, and it was affirmed on March 10, 1947.

The Receiver employed the services of a Tax expert in making his return of Income Taxes, a Mr. Franklin, a C. P. A. of Wenatchee (Tr. I-187).

But the Appellant contends that because the Receiver was not possessed of all of his property, that he had no right, notwithstanding the Order of the Court, to pay the Income Taxes. He makes no claim that he had any other income or that the amount of the tax paid was incorrect. The Receiver had possession of all the business that the Appellant possessed from which he could expect to derive any income. He makes no claim that the amount paid by

the Receiver would not be exacted from him had he made the return himself.

The Conciliation Commissioner in his Order of June 25, 1947, recommending the approval of the Receiver's Report, also recommended approval of the payment by the Receiver of the Income Tax for the fiscal year ending March 1, 1946, which later was approved by the District Judge. (Tr. I-188, 225. Tr. IV-925).

The Receiver was in possession of, and operating all of the income-producing business and property of the Appellant. Appellant filed no Income Tax returns for the years involved, because he had no income to report. It was certainly proper that the Receiver who produced the income from the property should file the Return and pay the tax.

Appellant, instead of being cooperative, has fought the Receiver at every turn. Appellant was at liberty to appear and contest the entry of the Orders of May 23, 1945, which authorized the Receiver to pay income taxes, but he did not do so, and he should not be permitted to do so now, over three years later. In fact, he is estopped from doing so. *Standard Oil Co. v. Grand Rapids Trust Co.,* 98 F. (2) 207, 209 (6).

Appellant suggests that he has a claim for damages against the Receiver, but the Record fails to disclose that he has suffered any damage. Nowhere has the Appellant produced evidence that he would have paid less in Income Taxes if he had made the

Tax Return and paid the tax himself as Trustee for the estate.

Further than that, an Order of the Court directing the payment of certain sums by the Receiver is sufficient to protect him from liability even though the Order is subsequently held void on appeal, if the Receiver acted in good faith. There is nothing to indicate either from the Record or from motive that the Receiver by paying the Income Tax was not acting in the best of faith. (*In re Lesster v. Lawyers Surety Co.* 63 N. Y. Supp. 804, 808; 53 C. J. 413, footnote 10)

Furthermore, possession by the District Court of the Receivership Fund, carried with it the power of directing disbursements, lawful or unlawful. (*In re Standard Oil Co. v. Grand Rapids Trust Co.,* 98 F. (2) 207, 209, C. C. 6)

But after all, the Receiver was under legal obligation to pay the Income Tax. Regulation 111, Sec. 29. 142-4 (As amended by "T. D. 5425 Dec. 29, 1944. Prentice-Hall 1947 Fed. Tax Service, Vol. 2, Income Tax, par. 17) contains the applicable provisions not quoted by Appellant at page 25 of Volume 1 of his Brief. The provisions pertinent to this inquiry read as follows:

> "Return by Receiver. A Receiver who stands in the stead of an individual or corporation, *must* render a return of income and pay the tax for his trust, but a Receiver of only part of the property of an individual or corporation *need not*" (emphasis added) * * *.

> "In general, statutory receivers and common law receivers of all the property, or *business* of an individual or corporation *must* make returns" (emphasis added).

The Receiver here stood in the stead of the Appellant with respect to the income from all of the business the Appellant had, which income as this Court has previously held, *Beecher v. Federal Land Bank* (153 F. (2) 982) "prior to the rental period is held by the Farmer as Trustee subject to the control of the Court." * * * "It is provided in Sec. 75 (n) that the filing of a petition 'shall immediately subject the Farmer and all of his property wherever located for all purposes of this section, to the exclusive jurisdiction of the Court'; thus it is clear that the Court retains a general power of control over this fund as over all other property within the Farm Debtor's Estate."

It will be noted that the Regulation does not prohibit the Receiver of only a part of an individual's property from paying the tax. It says only that he *need not* pay the tax.

This Receiver was not appointed as a receiver of rents and profits to hold and operate a mortgaged parcel of real estate. He was not appointed for the benefit of the secured creditors, but in the stead of the Appellant, who as a Trustee in Bankruptcy had let the only income producing property in the estate deteriorate to the point where the estate was about to suffer a severe loss.

It will be noted that the Regulation uses the disjunctive where it provides "in general statutory Receivers and common law Receivers of all the property, *or business* of an individual or corporation must make returns."

Here the Receiver was Receiver of all the business of the Appellant and therefore required to make the returns, even though he had not been authorized so to do by the Court.

Since he was the Receiver of all the business of the Appellant, there was no occasion for the Appellant to make a separate Tax Return for he had no other income to report. The Appellant has continuously asserted throughout the administration of his estate that he had no income and in fact has relied on this representation to secure permission from the Court to prosecute his appeals in forma pauperis. Hence the cases of *North American Oil Consolidated v. Collector,* 286 U. S. 417, 76 L. ed. 1197, and *National Petroleum & Refining Co. v. Collector,* 28 B. T. A. 571, are not in point, because those cases arose under the U. S. Withdrawal Act, under which Receivers were appointed to operate certain oil properties pending determination as to whether certain equitable as well as legal title was in the United States, and in each case the property operated by the Receiver was but a part of the total property owned by the corporation, and the corporation had other income on which it had to file a return.

It was under such a state of facts that the Court said in *North American Oil Consolidated vs. the Collector,* 286 U. S. 417, 423, 76 L. ed. 1197, 1200:

> "It may not be assumed that Congress intended to require the filing of separate returns for the same year each covering only a part of the corporate income, without making provisions for consolidation so that the tax could be based upon the income as a whole."

Since there was no reason for consolidation here, the rule does not apply.

The argument that until litigation terminates no income for tax purposes accrues, is not supported by any decisions, including the four cases cited by Appellant at page 28 of Volume 1 of his Brief.

In the present case there could be no argument as to the title to the money making up the income. Until the Receiver was appointed, title was in the Appellant as a Trustee in Bankruptcy, and when the Receiver was appointed, it was in the Receiver, who stood in the stead of the Appellant, as a Trustee in Bankruptcy.

No amount of litigation could affect the title to this income at the time it was received. The record shows that all of the income upon which the Receiver paid Income Tax was derived from operations prior to the entry of the Stay and the beginning of the rent paying period.

The good faith of the Receiver in paying the tax cannot be questioned. The Record shows that he made

the return and paid the tax on the advice of the tax expert, Mr. Franklin. The Record further shows that when the Appellant filed his objections to the recommendation of the Conciliation Commissioner, in which he again objected to the payment of the tax, that the Receiver immediately for his protection and the protection of the Estate, filed an application for refund with the Collector of Internal Revenue (Tr. IV-930), which was based on the grounds now urged by Appellant. What the Record does not show is that that application came on for hearing, at which hearing the Appellant was present, and allowed to produce any objections he had and the applications for refund have been denied.

We therefore submit that the Receiver's payment of Income Taxes on the earnings from the only business which the Appellant had, were proper, first because these payments were authorized by the District Court; second, Appellant is estopped because he asked for no stay of the order authorizing payments; third, because the Regulation authorized the Receiver to pay the tax; and fourth, because their payment was of benefit to the estate; and fifth, because they were paid in absolutely good faith.

FEES OF RECEIVER AND HIS ATTORNEY, FEES OF ATTORNEY FOR THE APPELLANT AND STENOGRAPHERS' FEES.

By the Court's Order of May 23, 1945, the Temporary Receiver was allowed a fee of $125.00, and

the Receiver was allowed a fee of $900.00 for the period from August 15, 1943, to March 1, 1945 (Tr. 11,503, p. 48).

All of the other fees complained of by the Appellant were allowed by the Court on the 30th of December, 1947 (Tr. IV-925).

The Receiver was allowed an additional fee of $1500.00, his attorney, $1350.00, the attorney for the Appellant, $700.00, the Court reporter's fees in connection with the Receiver's accounting, $127.50, and Robert F. Murray services as a Master in hearing the Final Report of the Receiver, $250.00.

The total fees allowed the Receiver and Temporary Receiver were $2525.00.

All of the above items were allowed as an expense of the receivership. They were not charged to the Appellant personally nor to his estate.

With respect to the fees allowed the Receiver, it was a very difficult job which the Receiver undertook and one which required a man of exceptional skill and training. It was fortunate that the Court was able to secure Harold D. Couch, who solved the very technical problems involved in rehabilitating an orchard that had been all but ruined by neglect and mismanagement. He gave the matter his personal attention. He laid out the work and hired competent men to carry it out. He kept the books and rendered a perfect accounting. He secured labor for picking and other orchard work, when labor was al-

most impossible to employ during the War years. He marketed the crops at the highest prices received for similar crops. He rehabilitated the orchard from a virtual wreck in 1943, to one of the cleanest in the district in 1945.

He showed an operating profit for the period March 1, 1944 to February 28, 1945, of $11,557.15 (Tr. 11,503 p. 18). No profit had been derived from the orchard for many years prior to that date.

He showed an operating profit of $21,764.88 for the period March 1, 1945, to February 28, 1946 (Tr. I-336), and these profits were not due so much to market conditions as they were to the fact that the orchard had been rehabilitated and really put into profitable production. He turned the orchard back to the Appellant in 1946 in excellent condition.

The Court made his allowance after evidence had been received as to the services actually performed and the results obtained, and also after taking into consideration the disbursements.

In *Beecher v. The Federal Land Bank,* 153 Fed. (2) 987, the Court said that it agreed with the holding *In re Arnold* 83 Fed. (2) 530, that:

> "Appellant erroneously assumed that the Court had no power to appoint a Receiver under Amended Section 75. Under this Section the power of the Court over the Bankrupt's property is almost unlimited in preserving and protecting it for the best interests of both the debtor and the creditor. See subsections (e), (n), (p) and

(s). Section 75 as amended (11 U. S. C. A. Sec. 203 ,e), (n), (p) and (s)).

"Grave duties and responsibilities are thereby laid upon the Court and we see nothing in the law to prevent it from performing those duties and meeting those responsibilities with the aid of receivers, custodians or any other officers of the Court whenever occasion demands it. It would be a physical impossibility for a Judge of the Court personally to attend to all such duties and we know of no enactment of Congress which indicates such requirement."

Yet the Appellant would have this Court hold that the power of the Court to appoint a receiver is entirely nullified because of the lack of power to compensate the Receiver and pay the expenses of the receivership.

But whether it be deemed that the Receiver was appointed under Section 75 or Section 11 (3), (5), of Title 11, U. S. C. A., the Receiver is entitled to compensation.

Even if his compensation is limited to the commissions provided for in Section 76 (3) of Title 11, U. S. C. A., the Receiver has not been overpaid.

The Receiver is entitled to commissions "upon the moneys disbursed or turned over to any person including lien-holders, by them, and also upon the moneys turned over by them or afterwards realized by the Trustees from property turned over by them in kind to the Trustees."

It is obvious that this Receiver has disbursed all that he has received.

The receipts are as follows:

July 6 to Aug. 15, 1943	1,688.07	Receiver
Aug. 15, 1943 to February 29, 1944	4,357.20	Temporary
Mar. 1, 1944 to February 28, 1945	58,800.21	(Tr. Cause No. 11,503, pp. 40-44)
Mar. 1, 1945 to February 28, 1946	69,308.60	(Tr. Vol. I-221-250)
Subsequent to February 28, 1946	1,627.40	(Tr. Vol. I-249)
	135,781.48	

Applying the commissions allowable under Section 76 (3) of Title 11 U. S. C. A. to the above amount, we have $2,995.63.

In addition to the above the Receiver turned over property to the Bankrupt consisting of the following:

Revolving Fund Certificate of Peshastin Fruit Growers (Tr. Vol. I-250)	$1611.59
6929 Apple Boxes (Tr. Vol. I-187) These boxes were worth from 10c to 25c apiece	

Also a large inventory of personal property, a lot of which had been purchased by the Receiver and charged to operating expenses (Tr. Vol. II, 253-254).

Included in the Receipts of the Receiver is $27,-

462.50 of money borrowed on notes from time to time but which were repaid, and are of course a part of his disbursements.

There is no question but that the Receiver conducted the business of the Appellant. *In re Duke,* 115 Fed. (2) 92 (Mo.) at page 93, the Court said:

> "In this context (Section 2 (5) of the Act; 11 U. S. C. A. Section 11 (5)) I am of the opinion that, the business is conducted by the Receiver where the Receiver carries on, at least substantially, the usual customary and normal activities of the Bankrupt as a going concern."

There is no question but that the disbursements on which the commission of a receiver is based, includes business expenses. In *Albers v. Dickinson,* 127 Fed. (2) 957, it was held that the commissions are to be allowed on the total disbursements made rather than upon such profits as can be disbursed.

The fee allowed to C. D. Randall as attorney for the Receiver for all services performed between July 3, 1943, when the Temporary Receiver was appointed, and the date when the Receiver was finally discharged, was $1350.00.

When the Receiver filed his Final Report on August 9, 1947, full compliance with General Order No. 44 was made (Tr. Vol. I-229, par. IX).

The Conciliation Commissioner recommended the fees asked for be allowed (Tr. Vol. I-191, par VI).

The employment by the Receiver of C. D. Randall

was ratified, approved and confirmed by Order of the District Court adopting and approving the recommendations of the Conciliation Commissioner entered on December 30, 1947, and the fee allowed (Tr. Vol. IV, 928, par III (b).

Even if the appointment of Randall at attorney for the Receiver had not been previously authorized by an Order of the Court, yet under General Order No. 44, the attorney who renders services is not barred from receiving a fee. True, the Court *may* refuse to allow a fee, but is not required to do so. The Court in this case, after a full hearing, exercised his discretion and allowed the fee. No claim is made that the fee allowed is unreasonable, and the slightest review of the record in this case, and the numerous appeals which have been prosecuted from the Order Appointing the Receiver, and the Orders approving the Receiver's Account, will convince anyone that the fee was exceptionally reasonable.

Randall was not disqualified by reason of representing the Leavenworth State Bank, one of the creditors, for the reason that the Receiver was not a Receiver for the benefit of creditors. He was not authorized to approve claims of creditors or make any disbursements whatsoever to them. He was simply a Receiver of the business property of the Appellant with power to operate the property and rehabilitate it, and save it from condemnation. He represented no interest adverse to the Receiver, the Trustee or the Estate.

Vol. IV of the Appellant's Brief is largely a rehash of arguments made by Appellant in Volume I with respect to the compensation to the Receiver and to the attorney for the Receiver.

With respect to the fees allowed the Receiver, the Appellant does not assert that the fee was unreasonable for the services performed, but only that under the law he is not entitled to any fee at all.

After the Receiver's Report was filed, the Appellant by Motion dated August 17, 1946, moved the Court that the hearing of the Receiver's Report fixed for August 22, 1946, be stenographically reported at the expense of the Estate, and in his Motion dated August 16, 1946, he applied for the appoinment of an attorney for the benefit of the estate at the cost of the estate. At the hearing on August 22, 1946, Joyce Price was employed to report said matter stenographically and Erle W. Horswill was appointed as the attorney (Tr. II, 427).

Mr. Horswill represented the Appellant and the Estate at the hearing before the Conciliation Commissioner on the Receiver's Final Report and the Commissioner allowed him a fee of $400.00.

On December 12, 1947, upon the Petition of the Appellant, the District Court again appointed Mr. Erle W. Horswill "to represent the Farm Debtor and the Estate in all proceedings now set for hearing on December 10, 11, and 12, 1947," which was the time set for hearing the objections of the Appel-

lant to the Receivership accounting. For his services at the hearing Mr. Horswill was allowed $300.00. The fee was satisfactory to all parties, including Mr. Beecher, and the Court ordered it paid as a part of the expense of the Receivership (Tr. IV-928; subparagraph (c)).

We are at a loss to understand why the Appellant objects to the payment of this fee as an expense of the Receivership when Mr. Horswill was appointed at his request to represent him and the estate at the receivership hearings, and it was made a charge against the receivership funds and not against the Appellant personally, nor his estate.

The Court also ordered the payment for stenographic services performed at the instance of Robert F. Murray, Conciliation Commissioner in connection with the hearings held by him on the Receivership Report amounting in all to $127.50 (Tr. Vol. IV, 929, subparagraph (e).

With respect to the $250.00 compensation allowed to Robert F. Murray who was the Conciliation Commissioner, the Court made the Order based upon the fact that Mr. Murray performed valuable services outside his line of duty as Conciliation Commissioner in taking the testimony on the Report of the Receiver and making the recommendations thereon to the Court with respect to said Report, and the Court found that the said Murray acted in that regard on Orders of the Court as Master. He found that the

hearing before the said Murray consumed at least two and one-half days, two days of which ran far into the night, and that Mr. Murray was, during said period completely isolated from taking care of his own law practice or performing any other services, and that it would be a grave injustice if Mr. Murray were required to perform said services without some compensation (Tr. Vol IV-929, subparagraph (d)).

All of these sums allowed by the Court have been paid, and the Receiver has been discharged (Tr. Vol. VI-1403).

CONCLUSION

The Record and Brief of Appellant shows that three reasons exist for the extended litigation in this proceeding, namely, the animosity of the Appellant to Mr. Field, the President of the Leavenworth State Bank; second, the unwillingness of Appellant to submit to any supervision or control of moneys by the Court; and third, the desire of Appellant not to pay his debts and interest, although the orchard property is of a value sufficient to pay all claims and interest.

Appellant admits that in June, 1947, he had in excess of $33,000.00 in one account, and $3,000.00 in another account (Brief II, p. 18), yet he permitted taxes to accumulate with resulting charges of 10% interest. As Appellant was put in possession of his property on May 6, 1946, the question naturally arises

from what source was the accumulation of money received? The natural inference is that it was from the net proceeds of crops raised during the year 1946-47 on the orchard property, for the production of which the Receiver had turned over $14,000.00 in cash, and approximately $6,000.00 in work performed. If so, forty percent thereof was due as rental and should have been available to pay taxes, upkeep, and to make some payment to the creditors. No rental has ever been paid. The Appellant has ignored every order that funds should be under the joint control of the Commissioner. Appellant has now in his possession checks which are the proceeds of crops which are payable jointly to the Commissioner and to Appellant, and which cannot be cashed because the Appellant has refused to endorse said checks and permit the funds to be held under the joint control of the Commissioner and himself, which method of handling was approved by this Court in 160 Fed. (2) 294.

Disregarding the unfounded claims of Appellant and looking only to the Record, we submit that these Appellees have at all times tried to cooperate and to secure an orderly closing of the estate. One might well question the good faith of the Appellant which is a necessary prerequisite to his continued operation under the Frazier-Lemke Act.

We submit that there is no merit in any of the appeals and that the Orders appealed from should be affirmed.

Respectfully submitted,

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